United States Court of Appeals

for the Second Circuit

APPENDIX

PAGINATION AS IN ORIGINAL COPY

76-2010

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

- x

CARLSON TANNER, JR.,

Petitioner-Appellant, : Docket No. 76-2010

v.

LEON VINCENT, Warden of Green Haven Prison, Stormville, New York,

Respondent-Appellee.

- x

B/P/S

APPENDIX

WILLIAM J. GALLAGHER,
The Legal Aid Society
Attorney for Petitioner
15 Park Row
New York, New York

Of Counsel:

WILLIAM E. HELLERSTEIN
G. CLARK CUMMINGS
350 Park Avenue
New York, New York 10022
(212) 752-5800

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

- x

CARLSON TANNER, JR.,

Petitioner-Appellant,

v.

LEON VINCENT, Warden of Green Haven Prison, Stormville, New York

Respondent-Appellee.

- x

INDEX TO APPENDIX

DIST/OFFICE	YR.	#	MO.	DAY	YEAR	J	N/S	O R	JUDGE NUMBER	JURY DEM.	DOCKET YR	DOCKET NUM
207-1	75	0719	05	09	75	3	530	1	0718			

APPEAL

DISTRICT J

PLAINTIFFS

TANNER, JR., CARLSON
CARLSON TANNER, JR.

DEFENDANTS

LEON VINCENT, Warden of Green Haven Prison, Stormville, N.Y.

CAUSE

HABEAS CORPUS

ATTORNEYS

WILLIAM J. GALLAGHER, ESQ.
Legal Aid
G. CLARK CUMMINGS, ESQ.
350 PARK AVE., N.Y., N.Y. 10022
(of Counsel)
Tel: 752-5800

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				JS-5	
				JS-6	

75C 719 U.S.A. ex rel. CARLSON TANNER, JR. vs. LEON VINCENT, etc.

DATE	NR.	PROCEEDINGS
5-9-75		Affidavit of Carlson Tanner, Jr., filed together with an order permitting the filing of petition without payment of costs, etc. (1 & 2)
5-9-75		PETITION FILED FOR A WRIT OF HABEAS CORPUS. (3)
5-9-75		Memorandum of Law filed. (4)
5-13-75		MEMORANDUM OF LAW FILED. (Letter of G.Clark Cummings, for Carlson Tanner, Jr.) (5)
6-10-75		BY COSTANTINO, J. ORDER TO SHOW CAUSE FILED (1) The Atty., Gen., State of N.Y. to show cause why a writ of habeas corpus should not be issued, etc. (See Order) dated 6-9-75 and (6) (7)
6-10-75		Copy of letter of Clerk of Court filed dated June 10, 1975 addressed to William E. Hellerstein, etc., re enclosure of a copy of order to show cause, etc. (8)
7-25-75		AFFIDAVIT OF JOAN P. SCANNELL, Deputy Assistant Atty., Gen., State of New York, etc. (9)
7-31-75		BY COSTANTINO, J.--Order dated 7-30-75 extending time for respondent's to answer to petitioner's application to 7-15-75 filed. (10)
9-3-75		Copy of reply memorandum of law for petitioner filed. (11)
11/6/75		By COSTANTINO,J.- Memorandum and Order dated 11/3/75 filed that the application for a writ of habeas corpus is denied. P.C. mailed to the attys. (12)
11-11-75		JUDGMENT dtd 11-10-75 dismissing the complaint filed. (mg) (13)
11/25/75		NOTICE OF APPEAL FILED.Copy of Notice of Appeal mailed to the C. o A. (14)
12-1-75		Letter dtd 11-25-75 to J. Costantino from G. Clark Cummings filed. (15)
12-18-75		By COSTANINO, J-Memorandum & Order dtd 12-18-75 denying the application for a certificate of probable cause filed. (mg) (16)
2-3-76		Copy of Civil Scheduling Order from Court of Appeals filed. (record b filed on or before 2-20-76). (17)
2-19-76		ENTIRE FILE CERTIFIED AND MAILED TO THE COURT OF APPEALS. (18)
2-23-76		Index on appeal received from the C of A for record on appeal filed. (19)

A TRUE COPY
ATTEST
DATED March 11 1976
LEWIS ORGEL
CLERK
BY Marilyn Klein
DEPUTY CLERK

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---x

CARLSON TANNER, JR.

75-C-719

v.

MEMORANDUM and ORDER

LEON VINCENT, Warden of Green Haven Prison, Stormville, N.Y.

NOV 3 1975

---x

COSTANTINO, D.J.

This is a petition for a writ of habeas corpus. Petitioner was found guilty after a jury trial in the Supreme Court, Queens County, of robbery in the first degree, manslaughter in the second degree and possession of a weapon. He was sentenced to a maximum of twenty-five years on the robbery charge and a maximum of fifteen years on the manslaughter charge. The sentences are to be served consecutively. The conviction was affirmed by the Appellate Division, First Department, and the New York Court of Appeals

Petitioner contends that the writ should be issued because his privilege against self-incrimination and right to counsel were violated by the admission into evidence of a confession made after he had received proper warning of his

FPI--SS--3-17-72--20M--9563

constitutional rights. Petitioner contends that this confession was tainted by earlier confessions given the police prior to the time petitioner was advised of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). He contends that the later confession should not have been admitted because petitioner believed at the time he gave it that it was futile to decline to make such a statement in view of the earlier confessions. Petitioner relies on United States ex rel. Stephan J.P. v. Shelly, 430 F.2d 215 (2d Cir. 1970). There the court held that petitioner's motion to suppress all statements made by him should have been granted because petitioner did not make a knowing and intelligent waiver of his rights to remain silent and have counsel present. In Shelly, the court recognized that a suspect is far less likely to give intelligent consideration to requests to waive his rights where he has already admitted his guilt prior to a proper warning of his constitutional rights. This behavioral analysis is characterized as the "cat out of the bag" theory, Shelly 430 F.2d at 218.

Petitioner's claim that he confessed subsequent to receiving Miranda warnings only because of his prior in-

admissible confession is inconsistent with the evidence in the record. Petitioner's answers to questions asked at a pretrial hearing held pursuant to People v. Huntley, 15 N.Y.2d 72 (1965) were at least somewhat contradictory. None of these answers, however, support the theory he is advancing here. On direct examination petitioner testified that he admitted guilt to the District Attorney despite receiving the constitutional warnings because he feared that law enforcement officials would kill him if he did not confess (Trial Record at 92). Under cross-examination at the Huntley hearing, he admitted stating to the Assistant District Attorney that the confession was given of his own free will (Trial Record at 96). Under questioning by the court at the Huntley hearing, petitioner admitted that at the time he gave the confessio to the Assistant District Attorney petitioner had advised the former that the confession was voluntarily given (Trial Record at 105). At no point did petitioner state at the Huntley hearing that the reason he made the later confession was because it was futile not to do because of the earlier confessions. The state court's finding of a knowing and intelligent waiver of petitioner's Miranda rights is fairly supported by the record. The

record fails to indicate a "causal relationship" between the earlier unconstitutional interrogation and the later incriminating statements. United States v. Knight, 395 F.2d 971 (2d Cir. 1968).

Petitioner also claims that he is entitled to the writ because the Assistant District Attorney testified at trial to a self-incriminating statement made by petitioner which had not been mentioned at the Huntley hearing. It should be noted, however, that this statement was made after proper Miranda warnings had been given. If any error resulted from admission of this statement, it was harmless beyond a reasonable doubt in view of the strong evidence of petitioner's guilt. The application for a writ of habeas corpus is denied.

U. S. D. J.

APPENDIX C

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* CARLSON TANNER, JR., Appellant.

Argued January 5, 1972; decided March 15, 1972.

Crimes — admissions — admissibility — admissions made by defendant to police were suppressed because of failure to give adequate Miranda warnings — court justified in holding subsequent statements made to Assistant District Attorney had been voluntarily made and were admissible — no factual basis to require finding that subsequent statements were tainted by earlier ones — ade-

Points of Counsel

quate notice given that statement would be offered at trial — sentences imposed for robbery and manslaughter, to run consecutively, permissible — robbery and homicide were successive separate acts.

1. As a result of a *Huntley* hearing, admissions made by defendant to the police were suppressed because of the failure to give adequate *Miranda* warnings. Admissions made to an Assistant District Attorney, concededly preceded by warnings on a preliminary oral examination, not recorded, and an examination recorded and transcribed in questions and answers, were not suppressed. The court, as a result of the hearing, was justified in holding the statements made to the Assistant District Attorney had been voluntarily made and were admissible. Whether an accused believes himself so committed by a prior statement that he feels bound to make another is a fact question. No factual basis appears in the record to require a finding that the subsequent statements were "tainted" by the earlier ones.

2. Defendant received adequate notice that the exploratory examination statement would be offered at the trial.

3. There was no such inconsistency between the exploratory statement and the question and answer statement as to require its suppression.

4. The charge to the jury on the essential elements of robbery was properly given.

5. The sentences imposed for robbery and for manslaughter, to run consecutively, were permissible within section 70.25 of the Penal Law. The robbery and homicide were successive separate acts and not a single act.

People v. *Tanner*, 36 A D 2d 690, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered February 1, 1971, affirming a judgment of the Supreme Court (EDWARD THOMPSON, J.), rendered in Queens County upon a verdict convicting defendant of robbery in the first degree, manslaughter in the second degree and possession of weapons and dangerous instruments and appliances as a felony.

G. Clark Cummings and *Robert Kasanof* for appellant. I. The failure to give defendant proper warnings when he was first taken into custody violated defendant's privilege against self incrimination. (*Harney* v. *United States*, 407 F. 2d 586; *Evans* v. *United States*, 375 F. 2d 355; *United States* v. *Pierce*, 397 F. 2d 128; *People* v. *Ruppert*, 26 N Y 2d 437; *United States ex rel. Stephen J. B.* v. *Shelly* 430 F. 2d 215; *People* v. *Stephen J. B.*, 23 N Y 2d 611.) II. The alleged incriminatory statement of defendant made during exploratory interrogation

was not admissible. The People improperly failed to inform defendant, prior to trial, that testimony derived from the exploratory interrogation would be introduced at the trial. (*People* v. *Remaley*, 26 N Y 2d 427.) III. The People violated section 813 (subd. f) of the Code of Criminal Procedure by failing to disclose at the *Huntley* hearing that they intended to rely on the exploratory interrogation as well as the subsequent written record of the interrogation. (*People* v. *Huntley*, 15 N Y 2d 72.) IV. As a matter of public policy the alleged incriminatory statement was inadmissible since it does not appear in the subsequent written record of the interrogation. V. The court erred in failing to charge that defendant could not be convicted of robbery unless defendant had a specific intent to rob. (*People* v. *Lupo*, 305 N. Y. 448; *People* v. *Gonzalez*, 293 N. Y. 259.) VI. The sentence was erroneous to the extent that the sentences for robbery and manslaughter run consecutively rather than concurrently.

Thomas J. Mackell, District Attorney (*Martin L. Bracken* of counsel), for respondent. I. Appellant's guilt was established beyond a reasonable doubt. II. The trial court properly allowed the introduction of appellant's admission to Assistant District Attorney Lombardino even though it suppressed appellant's previous admission to Detective Katz. (*United States ex rel. Stephen J. B.* v. *Shelly*, 305 F. Supp. 55, 430 F. 2d 215; *Clewis* v. *Texas*, 386 U. S. 707; *Davis* v. *North Carolina*, 384 U. S. 737; *Lyons* v. *Oklahoma*, 322 U. S. 596; *Commonwealth* v. *White*, 353 Mass. 409, 391 U. S. 968; *Myers* v. *Frye*, 401 F. 2d 18; *Commonwealth* v. *Moody*, 429 Pa. 39, 393 U. S. 882; *People* v. *Leonti*, 18 N Y 2d 384; *People* v. *Ruppert*, 26 N Y 2d 437; *People* v. *Yukl*, 25 N Y 2d 585.) III. Appellant received a fair and impartial trial. (*People* v. *Remaley*, 26 N Y 2d 427; *People* v. *Ross*, 21 N Y 2d 258; *People* v. *Dudley*, 24 N Y 2d 410; *People* v. *Eisenberg*, 22 N Y 2d 99.) IV. The trial court's charge was proper and did not deprive appellant of a fair trial. V. The sentence was legal and appropriate. (*People ex rel. Maurer* v. *Jackson*, 2 N Y 2d 259.)

BERGAN, J. Defendant has been sentenced in Queens County to a maximum of 40 years for robbery first degree, manslaughter

second degree and felonious possession of weapons and instruments. Proof was adequate that defendant and a companion held up a taxi driver and robbed him and that, after the robbery was completed and while the taxi driver was sitting in the cab offering no resistance, this defendant opened the door of the cab, shot and killed the driver. The crime was established both by defendant's confessions and by the testimony of Kenneth Fulmore, an accomplice. The sufficiency of the evidence to establish defendant's guilt quite beyond a reasonable doubt is not raised on this appeal.

The main questions raised turn on the effect and relationship of successive admissions elicited from defendant while in custody, the first by police after his arrest; the second a "dry run" or preliminary oral examination made by an Assistant District Attorney, not recorded, and the third an examination of defendant by the Assistant District Attorney recorded and transcribed in questions and answers.

The first admissions to the police were suppressed on consent of the People in the *Huntley* hearing by the hearing Judge because of the failure to give adequate *Miranda* warnings; but the court did not suppress the admissions made to the Assistant District Attorney which defendant conceded at the hearing were preceded by warnings, and these admissions in both the preliminary examination and the recorded examination were admitted on the trial.

Appellant argues that the suppressed admissions were so related to the subsequent ones that they "tainted" them and made them inadmissible; that he did not receive sufficient notice from the People that the "dry run" or "exploratory" unrecorded examination by the Assistant District Attorney would be offered on the trial; and that, in any event, the "exploratory" examination was inadmissible because some of it did not appear in the more formal and reliable transcribed statement.

A man who makes admissions under duress or in violation of his constitutional right to warning and advice may feel so committed by what he has then said that he believes it futile to assert his rights after he has been later advised of them before new questioning begins. This state of mind may have an effect

on the waiver leading to the later admissions; or on the voluntary nature of those admissions.

An interrelationship between statements was one of the grounds leading to the decision in *United States ex rel. Stephen J. B.* v. *Shelly* (430 F. 2d 215) which sustained a Federal habeas corpus order after this court had affirmed the conviction (*People* v. *Stephen J. B.*, 23 N Y 2d 611). The Federal court found the admission of the petitioner there, a 16-year-old boy, was not based on an intelligent waiver, and one factor, not apparently the controlling one, was the finding by the Federal court that having made a prior statement improperly elicited this let "the cat out of the bag" and affected his subsequent statement (430 F. 2d, p. 219).

Other reasons, however, among them the youth and inexperience of the petitioner, affecting ability to make a meaningful waiver, entered into the grounds laid down in the decision to which one Judge dissented and another agreed only to a footnote to the opinion (p. 219).

Whether an accused believes himself so committed by a prior statement that he feels bound to make another, depends on his state of mind which is a fact question. Appellant testified at the *Huntley* hearing. He did not say that his prior statement had any effect on his later statement to the Assistant District Attorney.

He testified he was then advised of his right to a lawyer but did not ask for one and made the subsequent statement because "I was scared". He continued to be afraid because the policeman had previously "promised to kill me".

The hearing Judge held the testimony of appellant incredible and found the statement had been voluntarily made. Although counsel for appellant raised the question before the hearing Judge that the subsequent statement was "tainted" by the earlier ones, no factual basis for this appears in the record, not even the defendant's own expression of his state of mind. Nor did counsel state the "cat-out-of-the-bag" theory to be a ground of "taint". The court, accordingly, was justified in holding the statement made to the Assistant District Attorney admissible.

The court does not reach on this record, therefore, and need not now decide, whether on a factual finding of association

between an earlier invalid admission and a later one, validly safeguarded, there must be suppression. The decisions in *People* v. *Stephen J. B.* (23 N Y 2d 611, *supra*), *Commonwealth* v. *White* (353 Mass. 409, cert. den. 391 U. S. 968) and *Lyons* v. *Oklahoma* (322 U. S. 596) seem to sustain admission of the statements taken by the Assistant District Attorney.

As to notice that the " exploratory " or " dry run " examination by the Assistant District Attorney would be offered on the trial, as well as the recorded statements, defendant received fully adequate notice. The People gave notice pursuant to the former Code of Criminal Procedure (§ 813-f) that they intended to offer statements attributed to defendant.

At the *Huntley* hearing there was extensive testimony as to the warnings given by the Assistant District Attorney before any admissions were made. Defendant inquired fully into this examination. Thus defendant was advised of the nature of this preliminary questioning and of its circumstances and had adequate notice that his admissions would be offered at the trial.

At the end of the *Huntley* hearing the hearing Judge ruled not only that defendant had been given *Miranda* warnings by the Assistant District Attorney, but that the statement given, later " reduced to writing ", was voluntary and admissible. Defendant's counsel could not reasonably believe that this preliminary statement would not be offered on the trial. He was not left uninformed on this. Thus *People* v. *Remaley* (26 N Y 2d 427) does not support appellant's argument.

Nor was there any such inconsistency between the dry-run exploratory statement and the question and answer statement as to require its suppression because it does not " appear " in the latter. The Assistant District Attorney testified on cross-examination that the two statements correspond factually " in substance ".

Appellant complains also about the charge to the jury on " specific intent " to commit robbery. The main charge covered the essential elements of robbery, especially where, as here, it was charged two men acted together in a conspiracy to rob. Among other things, the Judge said that a conspiracy may be an agreement to do an unlawful act, motivated " by criminal intent ".

Statement of Case

The purpose and intent to rob were elsewhere adequately explained to the jury and the People point out that section 160.15 of the Penal Law, defining robbery in the first degree, does not require a specific intent. A robbery such as this could scarcely happen without a purpose to commit it.

The maximum sentence imposed of 40 years was made up of 25 years for robbery and 15 years for manslaughter to run consecutively. This was permissible within section 70.25 of the Penal Law. The robbery and homicide were not a "single act". They were successive separate acts under the record here, where the shooting of the victim appears as an unnecessary afterthought (*People ex rel. Maurer* v. *Jackson*, 2 N Y 2d 259).

The order should be affirmed.

Chief Judge FULD and Judges BURKE, SCILEPPI, BREITEL, JASEN and GIBSON concur.

Order affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, ex rel.
CARLSON TANNER, JR.,

Petitioner

- against -

LEON VINCENT, Warden of Green Haven Prison, Stormville, New York,

Respondent.

- -x

75 C 719

MEMORANDUM OF LAW FOR PETITIONER

WILLIAM J. GALLAGHER, ESQ.
The Legal Aid Society
Attorney for Petitioner
119 Fifth Avenue
New York, New York

Of Counsel:

WILLIAM E. HELLERSTEIN
G. CLARK CUMMINGS
350 Park Avenue
New York, New York 10022
(212) 752-5800

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA ex rel. CARLSON TANNER, JR.,

Petitioner,

- against -

LEON VINCENT, Warden of Green Haven Prison, Stormville, New York,

Respondent.

- -x

MEMORANDUM OF LAW FOR PETITIONER

CARLSON TANNER, JR. petitions this Court for a writ of habeas corpus under 28 U.S.C. §§2541, 2544.

PROCEDURAL BACKGROUND

On April 10, 1969, after trial by jury, petitioner was convicted by the New York State Supreme Court, Queens, County, of robbery first degree, manslaughter second degree, and possession of weapons and instruments and sentenced to a maximum of forty years. Petitioner appealed to the Appellate Division, Second Judicial Department, which affirmed without opinion on February 1, 1971 and to the Court of Appeals of the

State of New York, which affirmed the judgment on March 15, 1972. A copy of the opinion of the Court of Appeals is annexed as an appendix. It is reported at 30 N.Y.2d 103.

STATEMENT OF FACTS

On March 15, 1968 petitioner and a co-indictee, Fulmore, stopped a taxi and forced the driver to take them to an isolated area. There the driver was robbed and fatally shot. Petitioner and Fulmore each sought to put the blame for the crime on the other.

At the trial, petitioner testified in his own defense. Fulmore testified for the prosecution.

The principal evidence of petitioner's participation in the crime (other than Fulmore's testimony) was an inculpatory statement allegedly made by petitioner to two Assistant District Attorneys and one of the arresting detectives. These three individuals testified that, while petitioner was being interrogated he said that Fulmore had proposed robbing the taxi driver and that petitioner had replied "All right...let's take him", or words to that effect. At the Huntley hearing the prosecution presented evidence as to four of five interrogations which had been made of petitioner.

1. Petitioner was arrested in his apartment by Detective Katz and two other detectives around 10:00 a.m. on March 15, 1968. Petitioner was given warnings in purported compliance with Miranda, and was then interrogated in the apartment (14, 15, 20).*

2. Around 10:30 a.m. petitioner was taken by Detective Katz and one of the other detectives to the station house in a police car. The interrogation continued en route (29-31, 33).

3. Petitioner arrived at the station house around 11:30 a.m. He remained in the custody of Detective Katz until the arrival of Assistant District Attorney Lombardino around 1 p.m. Interrogation by Detective Katz continued during this period (31, 34).

4. Lombardino first conferred with Katz to learn the results of his interrogations of petitioner (65). Next, Lombardino indicated to petitioner that he had conferred with Katz:

> "...I had told the defendant [petitioner] 'I understand you told the detectives what happened,' and he said, 'Yes, I did.' I said, 'Now, I want to reduce it to a formal statement,' and he said he understood..." (74).

*Numerical reference are to the minutes of the Huntley hearing and the trial.

Lombardino's testimony, at the Huntley hearing, created the the impression that he then gave petitioner Miranda warnings and proceeded directly to a formal, recorded statement in question and answer form. At the trial, however, it developed that Lombardino had first conducted an exploratory interrogation of petitioner, which he characterized as a "dry run". It was allegedly intended as preparation for the more formal interrogation which immediately followed (270-271).

5. Lombardino then took the formal statement from petitioner which was recorded by a stenographer and typed up in question and answer form (the "Q & A") (267).

An additional Assistant District Attorney, Nicolosi, and Detective Katz were present during both the dry run and the Q & A.

The Court at the Huntley hearing found that the warnings which preceded the first three interrogations had not complied with Miranda: petitioner had not been advised that he was entitled to counsel at that particular stage of the proceeding (120-121). As to the Q & A, however, the Court found that the warnings which immediately preceded it had complied with Miranda, and that the

Q & A would be admissible at the trial (122-123).

No finding was made at the Huntley hearing with respect to the admissibility of the dry run because the prosecution had not indicated that there had been a dry run.

At the trial, the two Assistant District Attorneys and the Detective testified as to the above-quoted inculpatory remark allegedly made by petitioner at the station house. On cross-examination all three witnesses conceded that the remark does not appear in the Q & A but only in the dry run which preceded it (215-219, 274-277, 341-344). And, the Court, in its marshalling of the evidence for the jury, recognized that the testimony of these three witnesses was based on the dry run rather than the Q & A (734, 735, 739).

ARGUMENT

I

PETITIONER'S PRIVILEGE AGAINST SELF-INCRIMINATION AND RIGHT TO COUNSEL WERE VIOLATED BY THE ADMISSION OF AN INCRIMINATORY STATEMENT, OBTAINED AFTER PROPER MIRANDA WARNINGS, BUT WITHOUT PETITIONER BEING AWARE THAT AN EARLIER INCRIMINATORY STATEMENT WAS INADMISSIBLE BECAUSE OF A FAILURE TO COMPLY WITH MIRANDA.

The instant proceeding raises the problem of the admissibility of an incriminatory statement which has been obtained after proper Miranda warnings but which has been preceded by a statement obtained without such warnings. It is petitioner's view that, unless a defendant is made aware of the inadmissibility of the earlier statement, subsequent Miranda warnings serve no purpose and cannot make a later statement admissible.

If the person conducting the second interrogation knows the results of the first interrogation, and, equally important, the defendant knows that he knows, then the defendant will see no reason to be silent. In other words there would be a reason for silence only if the defendant knew that the statement at the first interrogation had been improperly obtained and could not be used against him. Otherwise, the defendant would think that the cat is out of the bag, so to speak, and that there is no purpose in not repeating the first statement.

The decisional law, subsequent to Miranda, as it has evolved in most courts supports the interpretation of Miranda urged by petitioner. United States v. Pierce, 397 F.2d 128 (4th Cir. 1968) is illustrative. There, after a first confession to local police without Miranda warnings, the defendant was interrogated by FBI agents, who gave Miranda warnings and to whom defendant then repeated his confession. The following quotation indicates why the Court of Appeals for the Fourth Circuit held the second as well as the first confession inadmissible:

> The FBI entered the fray armed with defendant's earlier admissions to the [local] police, and it is most probable that defendant was aware of this fact. Defendant's knowledge, of this fact coupled with the agent's warning conveyed the idea that though defendant could remain silent if he wished, he might as well answer the questions put to him since the agent was already aware of the earlier answers. The decision hardly can be termed voluntary... Warning after the admission is too late, and the bare fact of subsequent repetition to the same or a cooperating officer cannot make the admission admissible. 397 F. 2d at 131

Using this analysis in the present case, there would seem no question that petitioner's statements at the station house were motivated by the fact that he had earlier made similar statements on three successive occasions to the arresting detectives. The Assistant District Attorney who conducted

the interrogation told petitioner that he knew of petitioner's earlier statements. In addition, one of the arresting detectives was present during the interrogation. Petitioner had no way of knowing that the earlier warn[illegible] by [illegible]tectives had not complied with Miranda and that [illegible] earlier statements were therefore inadmissible. In [illegible]s, so far as petitioner could tell, the cat was out of the bag, and the subsequent Miranda warnings were necessarily meaningless.

The New York Court of Appeals nonetheless held petitioner's subsequent incriminatory statement admissible. It appears to have done so for two reasons. First, the Court observed that petitioner "did not say that his prior statement had any effect on his later statements to the assistant district attorney". (Appendix,2) To require petitioner to say so, however, makes little sense. A defendant, if asked, would always affirm the existence of such a causal relationship. The issue should be — as United States v. Pierce suggests — whether the facts support the likelihood of such a relationship. The facts pertinent in the instant case are not in dispute, and there would seem little doubt as to such a relationship.

The second ground relied on by the New York Court of Appeals to reject petitioner's argument was that counsel for petitioner did not "state the 'cat-out-of-the-bag' theory to be

a ground of 'taint'". (Appendix,3) This is manifestly incorrect. Point II of petitioner's brief at the Huntley hearing (pages 7-9) not only developed this theory but quoted the passage from United States v. Pierce set forth above.*

The habeas corpus proceeding, in this Court, involving Stephen J. B. is almost identical with the present proceeding. There the writ was granted and this Court's decision was affirmed by the Court of Appeals for the Second Circuit. United States ex rel Stephen J. B. v. Shelly 305 F. Supp 55 (1969); aff'd as modified 430 F.2d 215 (1970).

*The conclusion is inescapable that the New York Court of Appeals did not familiarize itself with the transcript of the Huntley hearing. Otherwise the Court could not have asserted that petitioner's counsel had not advanced the "cat-out-of-the-bag" theory. Counsel's argument went, in part, as follows:

> "...the defendant continues to move to exclude all statements made allegedly either to the police officer or the Q and A statement to Mr. Lombardino, which was tainted by the failure of the police to issue the proper Miranda warnings, and that the statement to Mr. Lombardino was a direct result of having already given full statements, which Mr. Lombardino knew about, to the police. This was in the defendant's mind and it was stated to the defendant by Mr. Lombardino, and on that basis I would object to the use of any statements" (119-120)

Apart from actually using the label "cat-out-of-the-bag", it is difficult to see how petitioner's counsel could have more clearly evoked the cat-out-of-the-bag theory.

In Stephen J. B. a policeman had apprehended the petitioner, a sixteen year old, with a stolen car. After being given warnings which did not comply with Miranda, Stephen admitted the car was stolen. Promptly thereafter another policeman arrived on the scene. Stephen admitted to him also that the car was stolen. The second officer than gave Stephen proper Miranda warnings and asked him if he waived his right to remain silent. The response was affirmative, and Stephen again admitted the car was stolen. He was then taken to the police station, again given Miranda warnings, and again confessed. The trial court admitted the last two confessions, and Stephen then pleaded guilty. The New York Court of Appeals affirmed the trial court's action in admitting the two confessions. People v. Stepehn J. B. 23 N.Y. 2d 611 (1969).

In the subsequent habeas corpus proceeding this Court and the Circuit Court phrased the question in terms of whether Stephen, in fact, had voluntarily waived his Miranda rights. This precise question it was felt had not been before the New York State courts; and it was held that there had not been such a waiver. The following quotation from the opinion of the Circuit

Court sets forth the rationale of the decisions:

> As we have indicated, both the state and federal courts agree here that the original admissions...were improperly secured. Whether we characterize the rationale as the "cat-out-of-the-bag" theory or not, the simple, likely conclusion is that when a suspect, in the rapid sequence of events present here, has already admitted his guilt, he will be far less likely to give intelligent consideration to later requests to waive his right to remain silent and to have counsel present, since he will regard them as meaningless...Had petitioner been told that his prior admissions were invalid, or were there even the slightest basis in the record for inferring that he might have known that he had not yet legally incriminated himself when he made the third and fourth admissions, we might decide otherwise; but he was not, and there is not. The factors are closely intertwined and each admission cannot be viewed without reference to what happened so shortly before. And his age and his lack of prior contact with the police militate not only against finding a waiver, but against a specific finding of awareness of the invalidity of his first admissions. 430 F. 2d at 218.

The foregoing passage indicates that the decisive element was Stephen's unawareness that his "prior admissions were invalid". Without such awareness no decision to waive Miranda rights could have a rational basis. This, of course,

was exactly petitioner's situation in the present case. Since he did not know, or even suspect, that his earlier statements were invalid, his waiver of his rights at the station house was not a meaningful decision and he should not have been bound thereby.

Inexplicably the New York Court of Appeals, in the instant case, was uninfluenced by the habeas corpus decisions in Stephen J.B. It distinguished these decisions with the following comment:

> "The Federal court found the admission of the petitioner there, a 16 year-old boy, was not based on an intelligent waiver, and one factor, not apparently the controlling one, was the finding by the Federal court that having made a prior statement improperly elicited this let the "cat-out-of-the-bag' and affected his subsequent statement (430 F. 2d, page 219)..." (Appendix,2).

This analysis is debatable, to say the least. Any interpretation that the earlier, improperly elicited statement was not a "controlling" factor ignores most of the language, as well as the substance, of the passage quoted above from the opinion of the Circuit Court.

It is true, as the New York Court of Appeals noted, that the youth and inexperience of Stephen were additional considerations which affected his inability to make a meaningful waiver of his Miranda rights. Yet the differences between Stephen and petitioner are not so great as to compel a different approach here. Stephen was 16 and he had never been in trouble with the police. Petitioner also, although somewhat older — 27 — had not been in trouble with the police during the previous ten years.

All of the foregoing indicates the appropriateness of granting the writ. As a practical matter, any other approach than that urged here by petitioner would make possible a device by which the police could obtain a confession in a way contrary to the spirit of Miranda. All that might be necessary would be for one police officer to ignore Miranda and obtain a confession thereby. This, of course, would be inadmissible, but then a second police officer might comply with Miranda and obtain a repetition of the confession which would be admissible.*

*The interrogation of petitioner would not have been in compliance with Miranda and its companion cases even had petitioner not made incriminatory statements at the three prior interrogations. Westover v. United States 384 U.S. 436 (1966) requires that a defendant be given Miranda warnings at the time he is first taken into custody. Here, although petitioner was interrogated as soon as he was arrested, he did not receive proper Miranda warnings until his interrogation at the station house three hours later.

The New York Courts ignored petitioner's argument based on Westover.

II

PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE ADMISSION OF TESTIMONY AS TO AN ALLEGED INCRIMINATORY STATEMENT MADE BY PETITIONER DURING AN EXPLORATORY INTERROGATION, WHERE THE PROSECUTION, AT A JACKSON V. DENNO HEARING, DID NOT DISCLOSE THAT SUCH TESTIMONY WOULD BE INTRODUCED AND INDICATED THAT IT WOULD INTRODUCE ONLY THE WRITTEN RECORD OF A SUBSEQUENT FORMAL INTERROGATION.

Jackson v. Denno 378 U.S. 368 (1964) requires that a defendant be provided with an opportunity, prior to trial, to have a court determination of whether or not an admission has been obtained voluntarily. The procedure followed at the Huntley hearing in the instant case denied petitioner such an opportunity and hence deprived him of his Jackson rights.

As previously mentioned, petitioner was twice interrogated by an Assistant District Attorney at the station house. The first interrogation was exploratory, and was characterized as a dry run. A formal interrogation followed. This was recorded by a stenographer had has been referred to as the Q & A.

As also previously mentioned, at petitioner's trial two Assistant District Attorneys and a detective testified that petitioner had described his role in the crime as follows: When petitioner and the co-indictee Fulmore were in the taxi, Fulmore proposed robbing the driver to which petitioner allegedly

replied: "All right...let's take him". This quotation is the only admission of petitioner that connects him with the crime. Obviously, it is of extreme importance. Yet it does not appear in the Q & A and can only have been derived from the dry run.

At the Huntley hearing, however, the prosecution indicated to petitioner only that at his trial it would introduce the Q & A. Petitioner was not told that the prosecution would also offer testimony from the dry run. This, of course, deprived petitioner of all opportunity to establish, at the Huntley hearing, the involuntariness of the dry run. It also may have impaired petitioner's ability to establish the involuntariness of the Q & A.

Counsel for petitioner first learned that the prosecution was relying on the dry run through cross-examination at the trial of the three prosecution witnesses who testified as to petitioner's incriminatory statement. Of these three witnesses, only one, ADA Lombardino, testified as to any Miranda warning having preceded the dry run (265-267). At this point the trial was well under way, and counsel's opportunity for meaningful cross-examination was far less than it would have been had the

dry run been under consideration at the Huntley hearing.

As to the Q & A, petitioner's counsel cross-examined the two Assistant District Attorneys and the detective at the Huntley hearing. All three had testified as to the Miranda warnings which preceded the Q & A. But such cross-examination was necessarily conducted in ignorance of what may be highly significant evidence as to the involuntariness of the Q & A as well as the involuntariness of the dry run: the inconsistent between the Q & A and the dry run concerning petitioner's participation in the crime. Accordingly, by failing to disclose at the Huntley hearing its contemplated reliance on the dry run the prosecution denied petitioner his rights under Jackson v. Denno so far as concerns the Q & A as well as the dry run.

The only possible explanation for the decision of the New York Court of Appeals in the instant case is that the Court failed to comprehend what went on at either the Huntley hearing or at the trial, so far as the dry run is concerned. The Court's opinion, in this area, is inaccurate in almost every respect. The Court, for example, made the following statement:

> "At the Huntley hearing there was extensive testimony as to the warnings given by the assistant district attorney before any admissions were made

> including the "dry run" questions. Defendant inquired fully into this examination. Thus defendant was advised of the nature of this preliminary questioning and of its circumstances and had adequate notice that his admissions would be offered at the trial. (Appendix,3).

A review, however, of the 120 pages of the Huntley hearing transcript and the 6 pages of the Huntley Court's decision appended thereto, discloses not a single reference to the dry run (1-126). (Neither the Huntley Court nor, so far as appears, even petitioner's counsel had any idea that there had been a dry run.) The transcript is devoted entirely to the formal interrogation, which was embodied in written question and answer form. The prosecution testified only as to the formal interrogation and gave no indication that there had been any preliminary interrogation.

The opinion of the Court of Appeals is equally uncomprehending in another respect:

> "Nor was there any such inconsistency between the dry run exploratory statement and the question and answer statement as to require its suppression because it does not "appear" in the latter. The assistant district attorney testified on cross-examination that the two statements correspond factually 'in substance' (Appendix,4).

As pointed out earlier, however, the two statements

do not "correspond factually." If they had, it would have been unnecessary for the prosecution to introduce testimony from the dry run. The incriminatory statement ascribed to petitioner can only be derived from the dry run: it nowhere appears in the Q & A. (The complete Q & A is set forth at pages 466-496 of the trial minutes.) Actually, ADA Lombardino recognized that the two statements did not completely correspond and attributed any discrepancy to the fact that, in the formal interrogation, petitioner "started to hedge" (274).*

Moreover, regardless of the testimony of the assistant district attorney, the fact is that no correspondence exists. As previously mentioned, in its charge the trial court recognized that resort must be had to the dry run to support the admission of the incriminatory statement of petitioner on which the prosecution relied.

---

*Similarly, ADA Nicolosi said that during the formal interrogation petitioner was "a little more evasive" (343).

Detective Katz was more forthright in acknowledging that petitioner's incriminatory statement was derivable only from the dry run:

> "Whatever I had testified today was not all in the [Q & A] statement, there were other things which I testified to which wasn't in that statement" (216).

None of the foregoing testimony, of course, was referred to by the New York Court of Appeals.

Accordingly, the failure of the prosecution to advise petitioner, at the Huntley hearing, that testimony from the dry run would be introduced at the trial deprived petitioner of his Jackson v. Denno rights.

Respectfully submitted,

WILLIAM J. GALLAGHER
The Legal Aid Society
Attorney for Petitioner

WILLIAM E. HELLERSTEIN
G. CLARK CUMMINGS

Of Counsel

APPENDIX

State of New York
Court of Appeals

75-C-719

2. No. 259. 71

The People &c.,
Respondent,
vs.
Carlson Tanner, Jr.,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

March 15, 1972
tol.

BERGAN, J.:

Defendant has been sentenced in Queens County to a maximum of 40 years for robbery first degree, manslaughter second degree and felonious possession of weapons and instruments. Proof was adequate that defendant and a companion held up a taxi driver and robbed him and that, after the robbery was completed and while the taxi driver was sitting in the cab offering no resistance, this defendant opened the door of the cab, shot and killed the driver. The crime was established both by defendant's confessions and by the testimony of Kenneth Fulmore, an accomplice. The sufficiency of the evidence to establish defendant's guilt quite beyond a reasonable doubt is not raised on this appeal.

The main questions raised turn on the effect and relationship of successive admissions elicited from defendant while in custody, the first by police after his arrest; the second a "dry run" or preliminary oral examination made by an assistant district attorney, not recorded, and the third an examination of defendant by the assistant district attorney recorded and transcribed in questions and answers.

The first admissions to the police were suppressed on consent of the People in the Huntley hearing by the hearing judge because of the failure to give adequate Miranda warnings; but the court did not suppress the admissions made to the assistant district attorney which defendant conceded at the hearing were preceded by warnings, and these admissions

in both the preliminary examination and the recorded examination were admitted on the trial.

Appellant argues that the suppressed admissions were so related to the subsequent ones that they "tainted" them and made them inadmissible; that he did not receive sufficient notice from the People that the "dry run" or "exploratory" unrecorded examination by the assistant district attorney would be offered on the trial; and that, in any event, the "exploratory" examination was inadmissible because some of it did not appear in the more formal and reliable transcribed statement.

A man who makes admissions under duress or in violation of his constitutional right to warning and advice may feel so committed by what he has then said that he believes it futile to assert his rights after he has been later advised of them before new questioning begins. This state of mind may have an effect on the waiver leading to the later admissions; or on the voluntary nature of those admissions.

An interrelationship between statements was one of the grounds leading to the decision in United States ex rel. Stephen J. B. v. Shelly (430 F. 2d 215) which sustained a Federal habeas corpus order after this court had affirmed the conviction (People v. Stephen J. B., 23 N Y 2d 611). The Federal court found the admission of the petitioner there, a 16-year-old boy, was not based on an intelligent waiver, and one factor, not apparently the controlling one, was the finding by the Federal court that having made a prior statement improperly elicited this let "the cat out of the bag" and affected his subsequent statement (430 F. 2d, p. 219).

Other reasons, however, among them the youth and inexperience of the petitioner, affecting ability to make a meaningful waiver, entered into the grounds laid down in the decision to which one judge dissented and another agreed only to a footnote to the opinion (p. 219).

Whether an accused believes himself so committed by a prior statement that he feels bound to make another, depends on his state of mind which is a fact question. Appellant testified at the Huntley hearing. He did not say that his prior statement had any effect on his later statements to the assistant district attorney.

He testified he was then advised of his right to a lawyer but

did not ask for one and made the subsequent statement because "I was scared". He continued to be afraid because the policeman had previously "promised to kill me".

The hearing judge held the testimony of appellant incredible and found the two later statements had been voluntarily made. Although counsel for appellant raised the question before the hearing judge that the subsequent statements were "tainted" by the earlier ones, no factual basis for this appears in the record, not even the defendant's own expression of his state of mind. Nor did counsel state the "cat-out-of-the-bag" theory to be a ground of "taint". The court, accordingly, was justified in holding the statements made to the assistant district attorney admissible.

The court does not reach on this record, therefore, and need not now decide, whether on a factual finding of association between an earlier invalid admission and a later one, validly safeguarded, there must be suppression. The decisions in People v. Stephen J. B. (23 N Y 2d 611, supra), Commonwealth v. White (353 Mass. 409, cert. den. 391 U. S. 968) and Lyons v. Oklahoma (322 U. S. 596) seem to sustain admission of the statements taken by the assistant district attorney.

As to notice that the "exploratory" or "dry run" examination by the assistant district attorney would be offered on the trial, as well as the recorded statements, defendant received fully adequate notice. The People gave notice pursuant to former Code of Criminal Procedure (§ 813-f) that they intended to offer statements attributed to defendant.

At the Huntley hearing there was extensive testimony as to the warnings given by the assistant district attorney before any admissions were made including the "dry run" questions. Defendant inquired fully into this examination. Thus defendant was advised of the nature of this preliminary questioning and of its circumstances and had adequate notice that his admissions would be offered at the trial.

At the end of the Huntley hearing the hearing judge ruled not only that defendant had been given Miranda warnings by the assistant district attorney, but that the statement given, "later reduced to writing", was voluntary and admissible. Defendant's counsel could not reasonably believe that this preliminary statement would not be offered

on the trial. He was not left uninformed on this. Thus People v. Remaley (26 N Y 2d 427) does not support appellant's argument.

Nor was there any such inconsistency between the dry-run exploratory statement and the question and answer statement as to require its suppression because it does not "appear" in the latter. The assistant district attorney testified on cross-examination that the two statements correspond factually "in substance".

Appellant complains also about the charge to the jury on "specific intent" to commit robbery. The main charge covered the essential elements of robbery, especially where, as here, it was charged two men acted together in a conspiracy to rob. Among other things, the judge said that a conspiracy may be an agreement to do an unlawful act, motivated "by criminal intent".

The purpose and intent to rob were elsewhere adequately explained to the jury and the People point out that Penal Law section 160.15, defining robbery in the first degree, does not require a specific intent. A robbery such as this could scarcely happen without a purpose to commit it.

The maximum sentence imposed of 40 years was made up of 25 years for robbery and 15 years for manslaughter to run consecutively. This was permissible within Penal Law section 70.25. The robbery and homicide were not a "single act". They were successive separate acts under the record here, where the shooting of the victim appears as an unnecessary afterthought (People ex rel. Maurer v. Jackson, 2 N Y 2d 259).

The order should be affirmed.

* * * * *

Order affirmed. Opinion by Bergan, J. All concur.

APPENDIX E

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ JUL 25 1975 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. CARLSON TANNER JR.

Petitioner,

-against-

LEON VINCENT, Warden, Green Haven Correctional Facility,

Respondent.

AFFIDAVIT IN OPPOSITION

75 C 719

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOAN P. SCANNELL, being duly sworn, deposes and says:

1. I am a Deputy Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for the respondent herein. I submit this affidavit in opposition to petitioner's application for a writ of habeas corpus.

2. Petitioner was convicted after a jury trial in the Supreme Court, Queens County of robbery in the first degree, manslaughter in the second degree and possession of a weapon. Petitioner was sentenced to a maximum of twenty-five years on the robbery charge and a maximum of fifteen years on the manslaughter charge; the sentences to be served consecutively. The conviction was affirmed by the Appellate Division, First Department and the New York Court of Appeals. Petitioner is presently confined to Green Haven Correctional Facility.

3. In his application petitioner claims his privilege against self-incrimination and right to counsel were violated by the admission of his confession at trial. In addition, petitioner contends that his due process rights were violated in the prosecution's alleged failure to give notice of the use in evidence of a "dry run" interrogation.

4. Petitioner claims his privilege against self-incrimination was violated, in that, his second confession which was admitted into evidence at trial, was tainted by petitioner's first allegedly illegal confession based on a "cat out of the bag theory". At the Huntley hearing, the trial court found that prior to his first confession petitioner was advised that he "had the right to remain silent; anything he said could be used against him in a court of law; that he had a right to an attorney at every stage of the proceedings and that if he could not afford an attorney an attorney would be appointed for him or assigned to him by the Court" (121).* The trial court found that although petitioner answered in the affirmative when asked if he understood his rights, the Court was not convinced that petitioner understood that the questioning in his hotel room, subsequent to his arrest, was a stage in the proceedings. For the above reason petitioner's first confession was suppressed. The Court found that petitioner's second confession at the station house was preceded by proper Miranda warnings, voluntary, and thereby admissible at trial (120-123).

*The minutes of the Huntley hearing and trial are being forwarded with this affidavit. The numbers in parentheses refer to the pages of the minutes.

Petitioner's contention that a prior involuntary confession thereby taints any subsequent confessions based on a cat out of the bag theory is without merit. As the Supreme Court stated in United States v. Bayer, 331 U.S. 532, at 540 (1947) "... this Court has never gone so far as to hold that making a confession under circumstances which preclude its use perpetually disables the confessor from making a usuable one after those conditions have been removed". Accord United States v. Knight, 395 F. 2d 971 (2d Cir. 1968); Knott v. Howard, 378 F. Supp. 1325 (D. Rhode Island, 1974). In United States v. Knight, supra the defendant made certain admissions to local authorities during an interrogation without being given Miranda warnings. The defendant repeated the admissions to an F.B.I. agent after receiving proper warnings. The defendant claimed that his second admission was tainted by the former. The Court citing United States v. Bayer, supra, stated at 975 "that an admission once made should not in itself always be fatal". The Court further stated that a second confession's admissibility "... depends upon the 'causal relationship' between the earlier unconstitutional interrogation by the local police and the later incriminating statement....The ultimate issue is whether the federal authorities were the beneficiaries of the pressure applied by the local in custody interrogation. Westover, 384 U.S. at 497, 86 S. Ct. at 1639."

In upholding the admissibility of the defendant's statement to the F.B.I. the Court found at 975 that "the 'compelling pressures' which concerned the Supreme Court in Miranda were absent". The Court distinguished Westover v. United States, 384 U.S. 436 (1966) in that in Westover prior to receiving any warnings the defendant was interrogated continuously for fourteen hours. An additional distinguishing

factor was that in Knight, the suspect was questioned in his home. "Certainly the fact that a suspect is at home bears on whether pressure was applied".

The case at bar involves a situation analogous to the one in United States v. Knight, supra, rather than the coercive atmosphere in Westover v. United States, supra. Petitioner was questioned for a brief period in his hotel room and after being given his Miranda warnings.

Furthermore, the two cases which petitioner cites in support of his claim of taint are clearly distinguished from the case at bar. In United States ex rel. Stephen v. Shelley, 305 F. Supp. 55 (E.D.N.Y. Cir. 1969) the defendant was a sixteen year old, who had never been in trouble with the police. His parents had forced him out of their car, miles away from home, because he had too much to drink. The defendant and his friend had been wandering around all night without sleep and had taken a stranger's car. When advised of his rights, the police had neglected to tell the defendant that anything he said could be used against him and he had a right to an appointed attorney if he could not afford one. The Court in determining that the defendant had not voluntarily relinquished a known right, took into account defendant's lack of maturity and consequent lack of education, his inexperience with police, and the fact that the sergeant testified he observed the defendant crying and he looked as though he had not received enough sleep. In the instant case petitioner was anything but a tired frightened youth who had never been in trouble with the police. Likewise, the case of United States v. Pierce, 397 F. 2d 128 (4th Cir. 1968) is clearly distinguishable in that there the defendant was warned only of his right to remain silent. In the instant case

petitioner was given full Miranda warnings but the trial court was unconvinced that petitioner understood that his arrest was a stage of the proceedings and that he thereby had a right to an attorney at that moment.

The record is devoid of any evidence indicating that either of petitioner's confessions were a result of coercion or that the Assistant District Attorney, in obtaining the second confession, benefited from any pressure applied by the police. Petitioner's cat out of the bag claim seems an afterthought on his part, to fit his situation into a legal theory. Petitioner's own statements are riddled with inconsistencies. At the Huntley hearing petitioner testified that he refused the assistance of counsel and confessed to the Assistant District Attorney because he was scared the police were going to kill him, if he didn't confess (92). Now petitioner claims that his second confession was induced by the feeling that it would be futile to remain silent since his first confession had already let the cat out of the bag. The record indicates however, that petitioner's confession was knowing, voluntary and free of taint.*

5. With regard to petitioner's first confession it is doubtful that the Miranda rights given to the petitioner prior to his first confession would be deemed inadequate under federal constitutional standards. In the case of United States v. Floyd, 496 F. 2d 982, 988 (2d Cir. 1974) the defendant was advised that he had a right to an attorney but the government agent admitted that he had not expressly informed the defendant

* In regard to the Trial Courts finding that petitioner's second confession to be voluntary. See 28 U.S.C.A. 2254(d).

that he had a right to an attorney present before any questioning began. In this case as in the case at bar the defendant had answered in the affirmative when asked if he understood his rights. The Court held that the defendant had been adequately informed of his right to counsel. The Court stated at 998 "We have held that words of Miranda do not constitute a ritualistic formula which must be repeated without variation but that words which convey the substance of the warning along with the required information are sufficient." Accord United States v. Pacelli, 470 F. 2d 67, 72 (2d Cir. 1972) cert. den. 410 U.S. 983 (1973); United States v. Lamia, 429 F. 2d 373, 376 (2d Cir. 1970) cert. den. 400 U.S. 907 (1970); Evans v. Swenson, 455 F. 2d 291, 295 (8th Cir. 1972). In addition in Tasby v. United States, 451 F. 2d 394 (8th Cir., 1971) where the defendant was advised that an attorney would be appointed at the proper time, the Court stated at 398 "This statement even though a slight deviation from the Miranda prescription does not negate the overall effectiveness of the warning".

6. If any error resulted from the admission of petitioner's second confession at trial it was indeed harmless error. Even excluding petitioner's confession, the evidence against him was overwhelming. Petitioner's co-participant in the crime testified at trial to the following: petitioner had suggested they "take off the cab" (T. 371) when they entered the cab, petitioner was carrying a silver plated gun (366, 372). Upon demand, the taxicab driver then gave petitioner his money clip (378) and money changer. Petitioner told the driver to lay across the front seat; then, despite the victim's begging (377) petitioner shot him (382). The co-participant further testified that when he asked petitioner why he shot the driver

petitioner replied "Well, this shows you I can take a life" (386). This testimony was corroborated by items found in petitioner's hotel room at the time of his arrest; namely, the victim's money clip engraved with his and his wife's initials (184), which the co-participant identified as being the one given to petitioner by the victim (378), a silver plated 38 caliber Smith and Western revolver which the co-participant identified as being the gun petitioner was carrying on the night of the murder (366), and finally a spent shell casing from a 38 caliber Smith and Western bullet. At trial a ballistics expert testified that the spent shell casing which does not eject when fired (299) had been part of a bullet, fired from the gun seized in petitioner's hotel room. This evidence was further corroborated by the autopsy report which revealed that the cab driver had been killed with a 38 caliber Smith and Western bullet which was too deformed to determine whether it had been fired from petitioner's gun. Based on such overwhelming evidence it is clear that if there were any error it was harmless and the conviction should stand. As the Supreme Court stated in Milton v. Wainwright, 407 U.S. 371 377-378 (1972) "The writ of habeas corpus has limited scope; the federal courts do not sit to retry cases de novo but rather, to review for violations of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the State court ...". Accord Chapman v. California, 386 U.S. 18, 24 (1967); United States ex rel. Ross v. LaVallee, 448 F. 2d 552 (2d Cir. 1971); Harrington v. California, 395 U.S. 250 (1969); Milton v. Wainwright, 407 U.S. 371, 377-378 (1972).

7. Petitioner's second contention that his due process rights were violated because he allegedly was not given notice of the "dry run interrogation" is without merit. At the Huntley hearing the Assistant District Attorney stated:

> "However, the People will question Detective Katz and possibly Detective Sullivan if he was present in fact when I took the statement which reduced itself to the Q and A, questions and answers, and through Detective Katz I will attempt to develop what the defendant said to me." (118)

The Miranda warnings given to petitioner prior to the dry run, which was later reduced to the formal Q & A, were the subject of close scrutiny at the Huntley hearing (64-74). On cross-examination of the Assistant District Attorney, petitioner's counsel inquired into the rights given, and statements made by petitioner, to the Assistant. Furthermore, the Assistant District Attorney testified at trial that the statements given by petitioner during the dry run and on the formal Q & A were in substance the same (277). Petitioner was given proper notice of the statements to be used against him in compliance with § 813(f) of the former Code of Criminal Procedure.

WHEREFORE, respondent respectfully requests the petition be dismissed in all respects.

Joan P. Scannell
JOAN P. SCANNELL

Sworn to before me this
24th day of July, 1975

Ralph E. McGillicuddy
Assistant Attorney General
of the State of New York

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JOAN P. SCANNELL, being duly sworn, deposes and says that She is employed in the office of the Attorney General of the State of New York, the Attorney for Respondent herein. On the 24th day of July, 1975 she served the annexed upon the following named persons:

G. Clark Cummings
350 Park Ave
N.Y.C.

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at TWO WORLD TRADE CENTER NEW YORK, N.Y. 10047 directed to said Attorney at the address within the State designated by him for that purpose.

Sworn to before me this
24 day of July, 1975

Joan P. Scannell

Assistant Attorney General of
the State of New York

75 C 719

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. CARLSON TANNER, JR.,

Petitioner,

-against-

LEON J. VINCENT, Warden, Green Haven Correctional Facility,

Respondent.

AFFIDAVIT IN OPPOSITION

LOUIS J. LEFKOWITZ,
Attorney General

Attorney for Respondent

Office And Post Office Address
Capitol, Albany, N.Y. 12224
New York Office
TWO WORLD TRADE CENTER, NEW YORK, N.Y. 10047
Tel. (212) 488-3390

Personal service of a copy of
within
is admitted this day of
19

e notice that the within is a true
entered herein in the office of
.19

Yours, etc.,
OUIS J. LEFKOWITZ,
Attorney General,
For
nd Post Office Address
l, Albany, N.Y. 12224
w York Office
CENTER, NEW YORK, N.Y. 10047
,Esq.

notice that the within
ed for settlement and signature
on.
ge of the within named Court, at
of
, on the day of
19 , at M.

Yours, etc.,
LIS J. LEFKOWITZ,
Attorney General,
or
nd Post Office Address
l, Albany, N.Y. 12224
w York Office
CENTER, NEW YORK, N.Y. 10047
,Esq.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, ex rel. CARLSON TANNER, JR.,

Petitioner

-against- 75 C 719

LEON VINCENT, Warden of Green Haven Prison, Stormville, New York,

Respondent.

- x

REPLY MEMORANDUM OF LAW FOR PETITIONER

WILLIAM J. GALLAGHER, ESQ.
The Legal Aid Society
Attorney for Petitioner
119 Fifth Avenue
New York, New York

Of Counsel:

WILLIAM E. HELLERSTEIN
G. CLARK CUMMINGS
350 Park Avenue
New York, New York 10022
(212) 752-5800

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA ex rel. CARLSON TANNER, JR.,

Petitioner,

-against-

LEON VINCENT, Warden of Green Haven Prison, Stormville, New York,

Respondent.

- x

REPLY MEMORANDUM OF LAW FOR PETITIONER

The Affidavit in Opposition of Joan P. Scannell ("Affidavit") submitted on behalf of Respondent raises no issue not treated in Petitioner's Memorandum of Law. The Affidavit, however, contains several incorrect statements and this Reply is submitted soley to provide correction.

1. Page 3 of the Affidavit states that it is Petitioner's contention that "a prior involuntary confession thereby taints any subsequent confessions based on a cat out of the bag theory..." This is incorrect. Petitioner contends that unless a defendant is advised of the inadmissability of a prior confession obtained without Miranda warnings, a subsequent confession, even though preceded by

such warnings, is not admissable. United States ex rel Stephen J.B. v. Shelley 305 F. Supp. 55 (1969); aff'd as modified 430 F 2d 215 (1970) so holds. This principle has nothing to do with Bayer, Knight, Knot, or Westover, cited in the Affidavit.

2. The Affidavit persistently mistates the facts in such a fashionthat the issues before this Court are never truly dealt with. For example, at page 4, the Affidavit says:

> "Petitioner was questioned for a brief period in his hotel room and after being given his Miranda warnings."

In point of fact, petitioner was questions in his hotel room and on at least two other occasions in respect of which the trial court found that the interrogation was preceded by warnings that did not comply with Miranda: Petitioner was interrogated in his hotel room for approximately half an hour; in a police car for approximately an hour; and at the station house for approximately an hour and a half. (Petitioner's Memorandum of Law, p. 3). Only thereafter was he given warnings consonant with Miranda and at no time - and this is the crux of the Petition - was he advised that his three previous statements were inadmissible.

3. The affidavit attempts to distinguish Stephen J.B. (the Court of Appeals citation of which is inexplicably

omitted) by pointing out that the petitioner there was a "tired frightened youth who had never been in trouble with the police" (p. 4). The Affidavit then argues that this description did not fit the present Petitioner and hence Stephen J.B. is not determinative. In the first place, it is doubtful that a petitioner's physical or emotional state or his previous record has any relevance. The question is whether he thought the cat was out of the bag and made his subsequent confession for that reason. Secondly, the petitioner here did not differ essentially from Stephen J.B. He was 27 years old. Whether he was tired or frightened must be left to surmise but it is not unreasonable to assume that he was. He had not been in trouble with the police for at least 10 years.

4. The Affidavit seeks to argue, at pgs. 5 - 6, that the warnings given before the first three interrogations complied with Miranda. This is a surprising assertion. The trial court which heard the testimony of the interrogating officers concluded that Miranda had not been complied with because Petitioner had not been told that he was entitled to counsel at the time of any of the first three interrogations. The warnings were not only pointless but misleading and hence were totally inconsistent with the spirit and letter of Miranda. This Court has no choice but to follow the determination of the trial court.

5. The Affidavit argues that admission of Petitioner's inculpatory statement was harmless error. Nothing could be further from the truth. The only other evidence against Petitioner was derived from the testimony of Fulmore, a co-indictee who turned State's evidence and received a fifteen year sentence in contrast to Tanner's sentence of forty years. All of the evidence reviewed at pp. 6 - 7 of the Affidavit is based on Fulmore's testimony and is obviously suspect. Moreover, the Affidavit's analysis of the evidence is far from objective; there are references to various pieces of evidence found in Tanner's hotel room but the Affidavit does not mention that the room, on the evening in question, had also been occupied by Fulmore.

6. Only page 8 of the Affidavit is devoted to Petitioner's second argument that there was no evidence at the Huntley hearing in respect of the dry run. The Affidavit argues that "Miranda warnings [were] given to petitioner prior to the dry run... [and] were the subject of close scrutiny at the Huntley hearing". This is incorrect. The dry run was not even mentioned at the Huntley hearing; and, of course, the Huntley court could make no findings whatever in regard thereto.

The Affidavit ends on an illogical note with its following quotation from an Assistant District Attorney:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

CARLSON TANNER, JR.,

Relator-Appellant

v.

LEON VINCENT, Warden of Green Haven Prison, Stormville, N.Y.

Respondent.

- x

PROOF OF SERVICE

On March 12, 1976 I served on respondent a copy of the Appendix by mailing a copy thereof to Joan Scannell, Deputy Assistant Attorney General, Two World Center, New York, New York 10046.

Nancy B. Chakan

"...the statements given by petitioner during the dry run and on the formal Q & A were in substance the same (277)"

The incontrovertible proof that they were not the same is that Tanner's incriminating statement - "All right... let's take him" - is nowhere to be found in the Q & A. It is only in the dry run. If it were in the Q and A, only the Q & A would have been used, and no resort to the dry run would have been necessary. Moreover, two Assistant District Attorneys and the Detective who interrogated Tanner conceded that the inculpatory statement does not appear in the Q & A but only in the dry run (215-219, 274-277, 341-344). And, the trial court, in its marshalling of the evidence for the jury, recognized that the testimony of these three witnesses was based on the dry run rather than the Q & A (734, 735, 739).

Respectfully submitted,

WILLIAM J. GALLAGHER
The Legal Aid Society
Attorney for Petitioner

WILLIAM E. HELLERSTEIN
G. CLARK CUMMINGS

Of Counsel